



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 20, 2022

IN THE MATTER OF:

Appeal Board No. 610464

PRESENT: JUNE F. O'NEILL, MEMBER

The Department of Labor issued the initial determination holding Maplebear Inc., DBA Instacart Inc. (hereafter "employer" or "Instacart") liable for tax contributions effective 1st quarter 2015 based on the independent contractor misclassification of MN ("claimant") and any other individual similarly employed as a Full-Service shopper deemed to be in covered employment. (Appeal Board No. 610464 and )

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer. (Appeal Board No. 610465 and A.L.J. Case No. 019-03576)

Requesting a hearing, the employer contends that the claimant and all other individuals similarly employed performed services as independent contractors. The Administrative Law Judge held combined telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer and of the Commissioner of Labor.

By combined decisions filed January 28, 2020, the Administrative Law Judge granted the employer's application to reopen prior combined cases, sustained the employer's objection, and overruled the initial determination.

The Commissioner appealed the Judge's combined decisions to the Appeal Board, insofar as the decisions overruled the initial determination. The Board considered the arguments contained in the written statements submitted on behalf of the Commissioner of Labor and of the employer.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** Instacart operated a digital platform (web and mobile infrastructure) that provided on-demand grocery shopping and delivery service available in approximately 80 percent of U.S. households. Through Instacart's smartphone app, a customer ordered groceries from a retail store that contracted with Instacart, and a personal shopper handpicked the groceries and delivered the order to the customer. Minimum requirements to be a personal shopper included having a smartphone, lifting at least 30 pounds, and adhering to Instacart's Food Safety Policy and Best Practices. Instacart charged and collected from the customer the cost of the groceries, plus a service fee and a delivery fee for each order. Instacart also charged and collected from the participating retailer a percentage of the total sale, or a flat fee based on the number of orders completed. A general manager of Instacart oversaw a team of employees responsible for the operations of about 18 store locations. Instacart's team managed three categories of employees, a store site manager, a shift lead, and In-Store shoppers.

Instacart identified two available roles for shoppers: In-Store and Full-Service. The In-Store shopper was a part-time employee position with a maximum of 29 hours per week, and the number of hours scheduled fluctuated with customer demand. The In-Store shopper, per each shift, shopped for orders in a single store location without the need for an automobile. Instacart deemed the Full-Service shopper, like the claimant, to be an independent contractor position that offered the flexibility to choose work hours with no maximum cap. The Full-Service shopper shopped and delivered orders, and occasionally just delivered orders. The Full-Service shopper was required to have a working registered and insured vehicle. Instacart neither provided vehicle signage nor inspected the vehicle, and neither provided a uniform nor required a dress code.

Instacart provided basic information on how to use the mobile app for customers and shoppers via the Help Center. Instacart offered opportunities for referral incentives for both customers and shoppers who recommended the platform to others.

Individuals interested in providing shopping services through the Instacart platform underwent the onboarding process via an online website portal where they signed up to be a personal shopper. The individual submitted personal

identification, including name, phone number, email address, social security number, etc. The individual must answer some questions surrounding the ability to provide the service, including the possession of a smart phone, and the ability to lift a minimum of 30 pounds, etc.

An individual seeking a position of a Full-Service shopper must execute, via a third-party (HelloSign), Instacart's Independent Contractor Agreement, which provides, in part, as follows:

- \* The shopper must provide Instacart with authorization for a background check. (§ 2)

- \* Instacart shall pay the shopper pursuant to the attached rate schedule. (§ 2 )

- \* Instacart reserved the right to terminate the shopper's access to Instacart's platform in the event of a material breach, which shall include, but not be limited to,

- o the shopper's failure to complete the shopping and/or delivery services,
  - o the shopper's unauthorized disclosure of Confidential Information, or
  - o the shopper's carelessness, misconduct, or unjustifiable neglect of his/her duties. (§ 3)

- \* The shopper shall be engaged as an independent contractor, shall not be entitled to any employee benefits, and shall have the right to perform services for any other party as the shopper sees fit. (§ 4)

- \* Upon request by Instacart, the shopper shall provide proof of insurance coverage in the shopper's individual name related to workers' compensation, automotive liability, or other insurance. (§ 5.3)

- \* While providing the shopping and/or delivery services, the shopper shall provide all equipment, supplies, and tools; and the shopper shall maintain the latest version of Instacart's mobile app (§ 5.4)

- \* The shopper shall not disclose Instacart's Confidential Information, which shall include, but is not limited to, "all drawings, memorandums, invoices, diaries, project books, notebooks, sketches, reports, manuals, computer programs, [and] computer files", and such prohibition shall "survive the

termination of this Agreement and continue in perpetuity." (§ 6)

Upon completing the Agreement, Instacart prompted the applicant to download the Instacart mobile app. With the provided credentials, the applicant accessed helpful tips on using the app. The applicant uploaded documents and photos of one's driver's license, and vehicle registration and insurance, which information Instacart passed along to a third-party (Checkr) that conducted a background check (criminal background and motor vehicle report) that was paid for by Instacart. If the background check denoted a further review, Instacart proceeded with an "adjudication process" before clearing the applicant to provide Full-Service shopper services on the platform.

When the claimant underwent the onboarding process to be a Full-Service shopper, she was advised of the temporary hourly guarantee of \$11 per hour, which was intended to allow new Full-Service shoppers time to get familiar with the platform and to increase Instacart's order volume. Upon Instacart's satisfaction with claimant's answers to the onboarding questions, Instacart sent, and the claimant executed, Instacart's Independent Contractor Agreement, made effective December 5, 2017. The claimant's Agreement included two attachments (Exhibits A and B) that set the "payment rates and methods" as follows.

\* Full Service:

o The shopper shall be paid for each delivery with a minimum of \$3.00 per delivery, plus a minimum \$0.25 per item; the applicable pay rates for the week shall be posted weekly in the Instacart Shopper App, which is incorporated herein by reference.

\* Delivery Only:

o The shopper shall be paid for each delivery with a minimum of \$1.50 per delivery; the applicable pay rates for the week shall be posted weekly in the Instacart Shopper App, which is incorporated herein by reference.

\* On occasion, the shopper shall be eligible for a bump payment for services performed or for a bonus; the applicability and amount of such payments are listed in the Instacart Shopper App, which is incorporated herein by reference.

Instacart provided the Full-Service shopper, like the claimant, the fully executed Agreement, as well as a third-party payment card (Marqeta), funded by Instacart from its collection from the customer, to make the requisite

purchases. Instacart also supplied wearable Instacart lanyards. Some retailers (e.g., Costco) required the use of at least one insulated bag while shopping. Instacart provided the option to purchase an insulated bag from a third-party (Banco) or to provide proof of ownership of an insulated bag - Instacart recorded on the platform such purchase or possession. The claimant chose to work without an insulated bag.

On the mobile app, the Full-Service shopper viewed and chose territorial work zones; the claimant selected 39 zones in her local surrounding area. Within a zone, the Full-Service shopper selected to work posted hours of 1-, 2-, 3-, or 4-hour blocks. The platform sent reminder notifications 24 hours in advance of committed hours. Most Full-Service shoppers had "normal access" status, which is 24 hours in advance of any available hours. A new Full-Service shopper, like the claimant, or one who consistently completed services during the committed hours, had "early access" status, which is the ability to choose hours one week in advance. Early access status was lost by not maintaining a specified minimum number of work hours, or by incurring five or more reliability incidents over the last rolling 30 shopping days. A reliability incident was incurred under several circumstances, including by not acknowledging (accepting or declining) an order within 4- or 6-minutes (hereafter "acknowledgement window"), by not cancelling or adjusting 6 hours or more in advance of a previously committed shift, or by cutting short a committed shift in the middle of that shift. Instacart Community Support Services issued to Full-Service shoppers an email message providing detailed information regarding the circumstances and effects of reliability incidents. The claimant received various text and email messages from Instacart, including instructions to ensure that fresh produce was not bruised, and to ensure that selected products were not expired.

The platform offered either a single order or a batch of orders. An "order" was a list of groceries for one customer. A "batch" was multiple orders from a single store for multiple customers, e.g., the platform alerted that the batch consisted of three separate orders from X retailer and included Y number of items. An order contained various information, e.g., the retail store, the customer's first name and last initial, the grocery items and the number of items to be purchased, the expected pay rate, and the delivery-window period. At the committed hour, the platform sent an order or batch to the Full-Service shopper who needed to accept or decline within the acknowledgement window to avoid a reliability incident. The Full-Service shopper may decline an order or entire batch for any reason without penalty but could not divide a batch and

merely accept one order from a batch. After declining, the platform could display further orders to accept or decline.

When an order was accepted, the platform alerted the customer. When the Full-Service shopper arrived at the store and tapped "ready to shop" on the app, the platform alerted the customer. Instacart organized or grouped the list of items based on the manner each specific store (e.g., Costco versus Safeway) organized its groceries. As the Full-Service shopper scanned the barcode on each selected item, the platform alerted the customer to verify its accuracy. The Full-Service shopper noted on the app the inability to find an item, which then displayed customer entered

notations, e.g., to replace the item with another specified brand or to refund the item. If the customer made a note to be contacted via text or voice when changes were made, the platform prompted the Full-Service shopper. If the customer made no notations, the platform prompted the Full-Service shopper to select a suitable substitute from among Instacart's provided substitutes. Alternatively, the Full-Service shopper could choose to refund the item. Upon completing the shopping list, the app instructed to pay at the register, or the Full-Service shopper tapped "ready to check out"; again, the platform alerted the customer. With the provided payment card, the Full-Service shopper made the purchase and tapped "start delivery" on the app, which alerted the customer and surfaced on the app the GPS map with the customer's address.

The platform prompted the Full-Service shopper to enable the mobile app's location tracking services that permitted the customer to track the Full-Service shopper's location throughout the entire shopping process. The platform suggested a delivery route on any preferred map (e.g., Google map). Upon arriving at the customer's location, the Full-Service shopper tapped "arrived" on the app, which alerted the customer. After the Full-Service shopper delivered the order, the Full-Service shopper tapped "complete" on the app, which alerted the customer.

If the customer was not present, the Full-Service shopper tapped "customer MIA" on the app, which led to the choice of several options, including waiting for the duration of Instacart's suggested wait time, reaching out to the customer, leaving the order at the doorstep, rescheduling with the customer, keeping the prepaid groceries for themselves (in certain circumstances), and returning groceries to the store. Since the app indicated that the delivery was "handed" to the customer, the claimant never left an order at the

customer's doorstep.

If the Full-Service shopper and the customer could not resolve a dispute, the Full-Service shopper or the customer may contact the Instacart Community Support Services for assistance and/or to file a complaint. The Full-Service shopper could shop and deliver the entire order without tapping the app, which would produce a poor experience for the customer.

When the delivery was completed, the platform prompted the customer to tip and rate the Full-Service shopper on a one-to-five-star rating system. If the Full-Service shopper scored less than a five-star rating, the platform prompted the customer to provide feedback. The customer may issue a low score or provide negative customer feedback for various reasons (e.g., a late delivery, or an item that was expired). Instacart transmitted all customer feedback to the Full-Service shopper via the app. Instacart calculated a shopper score based on the number of orders without issues divided by the total number of completed orders. Instacart imposed no minimum shopper score, but it could affect the eligibility for a quality bonus or promotional incentive that was awarded as additional compensation to a shopper with a particularly positive performance rating. There was no immediate consequence for a low shopper score and poor customer feedback. However, if the Full-Service shopper habitually continued to make similar mistakes, Instacart, deeming the shopper no longer met the minimum standard requirements, could commence an investigation. A Full-Service shopper could use a substitute shopper if the replacement was already an approved Instacart Full-Service shopper.

Instacart provided online access to the Full-Service Shopper Account Access Guidelines, which was also emailed to the Full-Service shopper for review. In part, the email stated that the "Guidelines provide more details about the types of circumstances in which Instacart may restrict a Full-Service shopper's access to the platform in order to ensure the safe and reliable operation of the

platform, as expected under the terms of the Independent Contractor Agreement"; that the "failure to abide by these Guidelines may result in the termination of the Full-Service shopper's Independent Contractor Agreement and a Full-Service shopper's account being deactivated"; and that the "current version will be available through the Shopper App and will be posted in Shopper Help Center." The Guidelines, in part, provided that the Full-Service

shopper's account may be deactivated because of:

- \* Carrying a weapon while providing services through the App and while on the premises of a third-party retailer or a customer location

- \* Profanity

- \* Unwanted contact including but not limited to asking overly personal questions of customers, contractors, or employees of retailers or of Instacart

- \* Use of alcohol or drugs while providing services

- \* Conduct that is harassing or discriminatory in nature, e.g., offensive gestures, slurs, or other unwanted conduct based on any category protected by applicable law

- \* Bringing anyone along (including minors) who does not have an Instacart Shopper account while providing services on the platform

- \* Engaging in conduct that jeopardizes food safety, e.g., including tampering with packaging or placing nonretail items in bags, failing to verify possession of insulated bags

- \* Providing services that lead to repeated customer or retailer complaints

- \* Failure to adhere to industry norms with respect to food Safety, including but not limited to, failing to use insulated bags to protect food items that need to be maintained at a hot or cold temperature, or delivering products that smell of smoke

- \* Repeated failure to deliver orders on time or to deliver a complete order, including the failure to complete an order within a reasonable period of the time communicated to the customer, and the failure to complete an accepted batch

- \* Delegating another person (substitute) who does not have an Instacart Shopper account and whose activities are not conducted through the Instacart platform

- \* Otherwise allowing another person access to the Full-Service shopper's account for any reason

- \* Failing to maintain accurate, complete, and current Full-Service shopper's



account information

The Instacart Shopper Help Section contained information available to all shoppers regarding various educational topics (e.g., recommendations for shopping for meat or produce), as well as various topics to assist in the digital processes surrounding the platform and mobile app. Instacart also provided an optional food safety video to help Full-Service shoppers to safely handle and transport food.

Instacart limited offering an order that included the purchase of alcohol to Full-Service shoppers who completed the optional alcohol tutorial that, among other things, instructed to verify that the customer was 21 years of age or older by a valid government issued identification, to determine if the customer was intoxicated, and to obtain the customer's signature. Instacart provided guidance on how to determine intoxication, to return the alcohol to the store, per legal requirement, if unable to confirm a customer's proof of age, and that non-alcohol items cannot be returned to the store.

Instacart provided in-person assistance to Full-Service shoppers. For example, a Rochester Weekly Shopper Newsletter advised that "If you need a payment card, lanyard, or other supplies - or if you just have some questions - please stop in for Office Hours at the following locations and times.

Our Full-Service Shopper Mentor, \_\_\_\_\_ will be there to assist you! Tuesday, 10/3, Wegmans, 2301 Lyell Avenue - 3pm-7pm (two additional dates omitted)". The Newsletter also provided tips, e.g., the best way to handle multiple batches (at the same store for different customers), or how to identify the different types of squash. "Multiple batch orders are typically smaller than regular batches, so you can change the way you shop in order to keep things organized! The best way to shop is

Grab a cart and a couple of handbaskets

Put a handbasket in the cart for each customer to keep separated

Put items for Customer A in handbasket A (Customer B in handbasket B, Customer C in handbasket C)

Checkout and pay in order: hand basket A, then B, and then C"

The Newsletter stated that "the pricing you see in the App is the pricing that the customer saw online through the Instacart catalog," and that if the shopper noticed "unusual price discrepancies not related to the sale pricing

or something else is not right, we invite you to flag the item and our catalogue team will take a look." The Newsletter also contained a Full-Service Shopper Recognition section that highlighted an example of positive customer feedback.

In a sample email message, Instacart "put together a New and Prospective Shopper Panel, designed specifically to help answer any and all questions you may have about starting out on the Instacart platform! This panel consists of 8 experts from various teams at Instacart that work with new and curious shoppers on a daily basis." The claimant was not required to visit with a mentor or participate in a question-and-answer session.

In another sample email message, Instacart shared information regarding its available "PerkSpot", a one-stop-shop for exclusive discounts at many national and local merchants, "completely free" to Full-Service shoppers who merely signed up and created an account at <http://instacart.perkspot.com/> to enjoy access to thousands of discounts in dozens of categories, updated daily. If a merchant was not participating in PerkSpot, the Full-Service shopper could "request a merchant through your perks account, and [Instacart's] negotiating experts will work to get it for you." In another sample email message, Instacart provided the Full-Service shopper with a speed summary of how fast he worked, e.g., "Last week, you provided 28 hours of service, and shopped for 26 customers. Your total speed was 95 seconds per item which was 1 second faster than" the prior week. In another sample email message, Instacart emphasized that food safety was a top priority and asked shoppers to become "familiar with the relevant food safety risks associated with handling food by completing ... the 10-minute interactive orientation on food safety."

The customer could tip the Full-Service shopper directly in cash or through the app. The Full-Service shopper was paid for all completed orders on a weekly basis on Wednesday for the prior week from a third-party payment processor (Stripe) via direct deposit with no federal or state withholdings, which earnings were reported on IRS 1099 forms. Instacart provided neither fringe benefits nor reimbursement of expenses. Instacart provided an earnings report of completed orders with a breakdown of the delivery commission, the item commission, the customer tip, the deduction for the purchase of any insulated bags, etc.

The claimant applied for the Full-Service shopper position in December 2017 and was eligible to start work in January 2018. From March 4 through 20, 2018,

she completed a total of five orders but was paid for a total of seven orders - the first two orders were paid in connection with the temporary hourly guarantee. Instacart paid the claimant via direct deposit once a week.

OPINION: The evidence establishes that Instacart exercised or reserved the right to exercise sufficient supervision, direction, or control over the claimant and other similarly situated Full-Service shoppers to establish an employment relationship under the Unemployment Insurance Law. Before engaging the Full-Service shoppers, Instacart screened them via the onboarding process that included verifying their driving credentials, conducting a background check with an adjudication process if deemed warranted, and executing the Independent Contractor Agreement that prohibited disclosing Instacart's Confidential Information in perpetuity. As the job function of shopping for and delivering of groceries is not skilled labor, there was no need to test a shoppers' proficiency or otherwise supervise, evaluate, or train them. Instacart, not the customer, offered the assignments to the Full-Service shopper. Instacart maintained the roster of shoppers separated into its geographic zones with certain tags (e.g., possession of insulated bag or completion of the alcohol training) to match specific shopping orders to appropriate shoppers. Instacart organized the list of products on each order per each store's grocery organization to assist shoppers; it charged and collected from the customer the purchase cost, and the service and delivery fees, for each order; it provided shoppers with the payment cards and lanyards; it charged and collected from the participating retailers; it restricted a substitute shopper to one already approved by Instacart; it provided instructional and informative text and email messages, as well as online video tutorials and in-person question-and-answer sessions; it made available exclusive discounts; it supplied weekly shopping speed summaries; it maintained a rating system allowing customers to rate the Full-Service shopper; and it made available Community Support Services to address concerns from shoppers and customers alike and to otherwise field customer complaints.

Furthermore, Instacart provided early access status to certain Full-Service shoppers, like the claimant, and discriminated against most other shoppers who were provided normal access status. Not only did Instacart set the Full-Service fee at a minimum of \$3.00 per delivery, plus a minimum \$0.25 per item, and the minimum delivery fee at \$1.50 per delivery, but it further gave a temporary hourly guarantee, as well as adjusting the pay via a bump or bonus payment. Also, Instacart paid shoppers on a weekly basis. Instacart organized or grouped the list of items based on the manner each specific store organized

its groceries. The entire shopping process was controlled through the mobile app, including the tapping of selected products, the offering of substitute products, and the alert to check out at the register.

Also, Instacart required the claimant to comply with a host of enumerated prohibitions in its Full-Service Shopper Account Access Guidelines, and the failure to comply with the same could result in terminating the Full-Service shopper's Agreement and deactivating the Full-Service shopper's account. Moreover, the Agreement reserved the right to terminate the shopper's access to the platform based on the shopper's (1) failure to complete the shopping and/or delivery services, (2) unauthorized disclosure of Confidential Information (in perpetuity), or (3) carelessness, misconduct, or unjustifiable neglect of his/her duties. See *Matter of Lowry (Uber Tech., Inc.)*, 189 AD3d 1863 (3d Dept. 2020), where the Court found that Uber exercised supervision, direction, or control over the drivers. Here, Instacart controlled the shoppers' access to the customers, calculated and collected the service and delivery fees that set their compensation, tracked their location on the app (or had the ability to), reserved the right to adjust their compensation with guarantees and payments for bumps and bonuses, precluded them from engaging in specified behavior, and encouraged and promoted them through a five-star rating system. See *Matter of Hossain (Groundanywhere LLC)*, \_\_ AD3d \_\_,

NY Slip Op 03424 (May 26, 2022), where the Court held that the "relationship between Groundanywhere and its drivers is not materially distinguishable from the employment relationship between Uber and its drivers."

Instacart contends that *Matter of Walsh (TaskRabbit Inc.)*, 168 AD3d 1323 (3d Dept 2019) is controlling. Although there are some similarities to Instacart, such as background checks, online questionnaires, and the ability to cancel jobs and to provide services on other platforms, significant differences distinguish Walsh where taskers bid for odd jobs posted on the platform by client; taskers were awarded jobs either by a client selecting the most competitive bid or by being the first tasker to submit a bid on a particular job; all communications regarding the job were between the client and the tasker; taskers were not provided with any equipment, supplies or uniforms; taskers were merely provided guidelines designed to assist in effectively using the platform; and by "virtue of the nature of the platform, TaskRabbit exercised absolutely no control over the manner in which the taskers completed the jobs that they obtained from clients." Here, however, Instacart played an important role in having the shopper utilize the platform through each step of

the shopping and delivery process. In addition, Instacart set the rate of pay, provided a temporary guaranteed hourly rate, offered bump and bonus payments, provided opportunities for exclusive discounts, supplied a payment card and lanyard, and required compliance with its guidelines or face deactivation from the platform. Instacart also provided instructional and educational materials directed to help with the shopping process through text, email and online tutorials. Similarly, Instacart's reliance on other cases are unconvincing, including *Matter of Hawkins (A Place for Rover Inc.)*, 198 AD3d 1120 (3d Dept 2021), where the Court distinguishes *Matter of Vega (Postmates Inc.)*, 35 NY3d 131 (2020); and *Matter of Lowry (Uber Tech., Inc.)*, 189 AD3d 1863 (3d Dept. 2020).

Next, Instacart relies on *Matter of Yoga Vida NYC Inc.*, 28 NY3d 1013 (2016) where the Court of Appeals differentiated between the staff yoga instructors from the non-staff yoga instructors. There, however, the Court held that the non-staff instructors made their own schedules, chose how they were paid (either hourly or on a percentage basis), were paid only if a minimum number of students attended, were free to work elsewhere and to solicit students, and were not burdened to attend meetings or receive training. However, the Court of Appeals, in a later decision, noted that "the importance of different indicia of control will vary depending on the nature of the work, and yoga instructors are not couriers [and a] yoga instructor provides a service that is, in some respects, unique to that instructor ..." *Matter of Vega (Postmates Inc.)*, 35 NY3d 131 (2020). Similarly, non-staff yoga instructors are not low-paid shoppers who performed unskilled labor; and shoppers could not choose how they were paid, were paid a guaranteed hourly rate (albeit temporarily), did not have the ability to solicit customers, as well as other distinguishing factors mentioned above.

Under these circumstances, Instacart exercised or reserved the right to exercise sufficient supervision, direction, or control over the claimant and other similarly situated Full-Service shoppers to hold them to be employees of Instacart for unemployment insurance purposes.

**DECISION:** The combined decisions of the Administrative Law Judge, insofar as appealed, are reversed.

The initial determination, holding Instacart liable for tax contributions effective 1st quarter 2015 based on the independent contractor misclassification of the claimant and any other individual similarly employed

as a Full-Service shopper deemed to be in covered employment, is sustained.

(Appeal Board No. 610464 and )

The claimant is deemed to be an employee with credited remuneration from this employer.

(Appeal Board No. 610465 and 019-03576)

JUNE F. O'NEILL, MEMBER